IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 17, 2009, Session

STATE OF TENNESSEE v. TAMMY R. FLATT

Direct Appeal from the Criminal Court for Wilson County
No. 070210 Jane Wheatcraft, Judge

No. M2008-01959-CCA-R3-CD - Filed December 2, 2009

The Defendant, Tammy R. Flatt, pled guilty to one count of robbery, a Class C felony, and four counts of aggravated robbery, a Class B felony. The trial court imposed a total effective sentence of twenty-three years in the Tennessee Department of Correction ("TDOC"). The Defendant appeals, contending: (1) the trial court erred in setting the length of each of her sentences; and (2) the trial court erred when it imposed consecutive sentencing. After a thorough review of the record and relevant authorities, we conclude that the trial court erred in its application of one enhancement factor and in failing to apply certain mitigating factors. We further conclude that the trial court's imposition of consecutive sentencing was improper. Accordingly, we modify the Defendant's effective sentence to ten years in the TDOC.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed & Modified

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Cynthia S. Parson (at trial and on appeal), Nashville, Tennessee, and William T. Ramsey (on appeal), Nashville, Tennessee, for the Appellant, Tammy R. Flatt.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Matthew Bryant Haskell, Assistant Attorney General; Tom P. Thompson, District Attorney General; Brian Fuller, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's attempts on five occasions to obtain prescription painkillers from Wilson County pharmacies by disguising herself and claiming to wield a handgun. According to the affidavits supporting the Wilson County indictments against the Defendant and according to the Defendant's pre-sentence report, on June 1, 2006, the Defendant entered an Eckerd pharmacy, and approached a pharmacy technician. She indicated she had a gun by pulling a weapon's handle partially from her purse and then demanded morphine and morphine patches.

On August 12, 2006, the Defendant entered a Rite Aid pharmacy and handed the pharmacy technician a note that read "I have a gun in my purse. I want you to give me your pain patches and morphine. Don't do anything stupid and nobody will get hurt. Hurry up." The technician gave the note to the pharmacist who began to gather the patches for the Defendant. The Defendant told the pharmacist to also give her oxycodone, but the pharmacist informed the Defendant the pharmacy no longer stocked oxycodone. After receiving the patches from the pharmacist, the Defendant told the pharmacist and the technician to wait fifteen minutes before calling the police.

On September 9, 2006, the Defendant entered a CVS pharmacy and handed the pharmacy technician a note similar to that which she gave the Rite Aid pharmacy technician on August 12. The Defendant pulled a weapon partially from her purse, displayed a gun to the technician, and kept her hand in her purse.

On December 7, 2006, the Defendant returned to the Eckerd pharmacy she had previously robbed and handed the pharmacy technician a note demanding morphine and morphine patches. The Defendant told the pharmacy workers she had a gun and pulled a weapon partially from her purse, displaying only the weapon's handle.

On December 28, 2006, the Defendant entered Fred's pharmacy and handed the pharmacist a note in which the Defendant claimed to have a gun and demanded morphine. Again, the Defendant partially pulled a weapon from her purse, displaying the handle of a gun.

A Wilson County grand jury indicted the Defendant for one count of aggravated robbery for every victim present during each robbery, for a total of ten counts of aggravated robbery. The Defendant pled guilty to four counts of aggravated robbery and one count of robbery with the trial court to determine the length and manner of her sentence.

According to the Defendant's presentence investigation report, the Defendant was verbally and physically abused by her step-father. Her mother and step-father divorced when the Defendant was fifteen years old. The Defendant graduated from high school in 1986 and obtained her cosmetology license the following year. By age twenty, the Defendant was married to a physically

abusive husband with whom she had two sons. The Defendant divorced her first husband, and she remarried in 1993.

The report indicated the Defendant experienced major depression, for which she received Social Security Income Disability payments from 2004 until her January 2008 incarceration. The Defendant's mother, father, aunts, uncles, and half-sisters have all experienced drug addiction. In 1999, at age thirty, the Defendant became addicted to various prescription painkillers such as Lortab and morphine. In 2000, she committed identity theft for which she received pre-trial diversion. That same year, the Defendant entered an in-patient drug rehabilitation program. Sometime after attending this in-patient program but before the crimes at issue, the Defendant entered another drug treatment program for an unspecified period of time. The Defendant reported only one period of employment on the presentence report: she worked for Hermitage Eye Care from June 2002 until she was fired in January 2003.

The presentence report indicates that the Defendant robbed several pharmacies in 2006 in Sumner County, as well. The Defendant was convicted of two counts of aggravated robbery and given a six-year sentence in the TDOC for these Sumner County pharmacies. The Defendant gave the following explanation of why she robbed pharmacies in 2006: "I became addicted to prescription pain killers sometime around 1999. This addiction continued until my arrest in December, 2006. During my addiction, I made the very bad decision to commit crimes to obtain pain killers." According to the Defendant, she has not used painkillers since she was arrested in December 2006 for robbing the Eckerd pharmacy. She completed an out-patient drug treatment program between January and March of 2007.

At the Defendant's sentencing hearing, April R. Thatch, the investigating officer who prepared the Defendant's presentence report, testified that the Defendant's robberies resulted in a total of fifteen victims, including one minor and one pregnant woman. Officer Thatch sent a request for a victim impact statement to each victim, and four of the victims completed and returned a statement to Officer Thatch, who attached the statements to the Defendant's presentence report. According to Officer Thatch, each victim believed during the robberies that the Defendant possessed an actual handgun, and several believed the Defendant was going to kill them. In their statements, each victim reported a fear of coming to work and a decreased work productivity, with some victims reporting nightmares about the robberies.

Officer Thatch was unsure whether the Defendant's 2001 identity theft conviction was drug-related, but she testified Hermitage Eye Care fired the Defendant in 2003 after the Defendant used a physician's prescription pad to forge a prescription.

On cross-examination, Officer Hatch said the Defendant provided her with all the information she requested. The officer was unable to obtain specific information about the drug

treatment programs the Defendant attended, however, because the officer did not have the necessary information release forms from the Defendant.

Tessily Cannon, a pharmacy technician at the CVS pharmacy that the Defendant robbed on September 4, 2006, testified she was a seventeen-year-old high school senior at the time of the robbery. Cannon said the Defendant approached her station at the CVS pharmacy around 2:00 or 3:00 p.m. and handed her a note stating she had a gun and wanted morphine and morphine patches. Cannon looked up at the Defendant, and the Defendant placed her purse on the counter separating them and displayed the handle of a gun. Cannon became afraid and began to cry but went to the pharmacist and handed her the note. The pharmacist, Maxey, told Cannon to go to the back of the pharmacy, and Maxey gathered the drugs demanded in the note. Maxey gave the Defendant the drugs, and the Defendant left CVS.

According to Cannon, the robbery lasted only a few minutes, and other CVS patrons were not aware the robbery was occurring. Despite its short duration, the robbery affected the way Cannon approached her job. After the robbery, Cannon became more cautious and "short" with new customers, especially those requesting painkillers. After she heard the Defendant had robbed the Eckerd pharmacy twice, Cannon feared the Defendant would return to the CVS pharmacy. Cannon had the following view of her future as a pharmacy technician: "[I]t's just going to get worse. There[are] going to be more robberies, and the next time . . . they might actually start shooting or something like that."

The Defendant, who was serving a jail sentence from her Sumner County conviction at the time of the sentencing hearing, confirmed the presentence report's account of her family's history of addiction. She explained she only became aware of this history after her addiction developed. She confirmed the report's account of two marriages, elaborating that she experimented with drugs with her first husband, with whom she had two sons. The Defendant and her first husband divorced, and, according to the Defendant, her first husband abandoned his parenting responsibilities after their divorce. The Defendant, who married again, testified that her second husband was a good father to her two sons but divorced her after the robberies.

Regarding her work history, the Defendant explained she worked as a hairdresser for eight years when her children were small, but she stopped working for a brief time after she married her second husband. When her children were slightly older, the Defendant became certified as a nurse technician and worked at Summit Hospital for one year. After working at Summit, she worked at Hermitage Eye Care for almost a year until she was fired.

The Defendant then testified about her drug addiction, explaining that, during the course of her and her second husband's attempts to have a child together, the Defendant found out she needed a hysterectomy. Unable to have more children with her second husband, the Defendant became

severely depressed and began to rely on the painkillers hydrocodone and Lortab, which were prescribed to her after her hysterectomy. She explained that the painkillers gave her the energy to get out of bed in the morning and work around the house and said the painkillers made her feel she could "deal with everything better." After her doctors stopped prescribing her pain medication, the Defendant "doctor shopped" to obtain pain medication and, in at least one instance, forged a prescription, which Hermitage Eye Care uncovered in 2000. The Defendant said that, although she knew lying and stealing "wasn't right," she felt she had to have the painkillers because she was physically addicted to them.

The Defendant attended five different drug rehabilitation programs before the robberies at issue. She explained that her addiction persisted through the treatment programs because she "didn't surrender" and "didn't understand enough," erroneously believing that getting the drugs "out of her system" would end her addiction. At some point during her trips in and out of rehab, the Defendant came across her grandmother's prescription for morphine and, after the Defendant tried one pill, she became addicted to morphine. The Defendant's addiction to morphine was far worse than her addiction to other painkillers, and, when unable to obtain morphine, she became "sicker than [she had] ever been in [her] life," experiencing vomiting, diarrhea, lack of appetite or thirst, physical pain, and lethargy. She continued to take morphine from her grandmother until her grandmother moved away. Having lost her most constant source of morphine, the Defendant feared morphine withdrawal symptoms and her family's potential knowledge of her new addiction. At the hearing, the Defendant explained: "I just could not get sick. I felt like I could not get sick. I was at the point I did not want anybody to know I was addicted again. I'd already . . . been to treatment. I'd already disappointed my family and I was trying to hide it from everybody." The Defendant recounted that she then decided to rob a pharmacy.

Speaking about the robberies, the Defendant said that, although she had access to her husband's handgun that he kept in their home, she did not arm herself with the handgun. Instead, she brought only an unloaded pellet or "bb" gun to each robbery. During each of the robberies, the Defendant entered the drug stores, sometimes disguised with a baseball cap and sunglasses, approached the pharmacy, waited for any pharmacy patrons to leave, and then either told a pharmacy worker she had a gun and wanted pills or delivered a note to that effect. The Defendant said "it made [her] sick" to think that she had made Cannon feel afraid, and that, as a parent, she understood how Cannon's parents felt when their daughter was robbed.

Soon after her December 28 robbery of the Eckerd pharmacy, Wilson County detectives visited the Defendant at her home and questioned her about the robberies. The Defendant soon confessed, and the detectives arrested the Defendant and brought her to jail, where she withdrew from morphine. Of this withdrawal experience, the Defendant said,

> I laid on a mat on the floor and was physically sick for a week and couldn't eat, couldn't drink. I got dehydrated. Finally, they took me to the emergency room to get

> fluids. I hurt and I wanted to die. I was humiliated. I was sick and I thought I was going to die, and I think at that point I wanted to die.

The Defendant said this experience taught her that "[morphine] was not a joke. It had taken [her] to places [she] never thought [she] would be, and [she was] a drug addict and . . . could not use drugs, at all, period." After the Defendant was released from jail, she completed an out-patient drug treatment program and began attending Narcotics Anonymous meetings. Around this time, her husband divorced her. In June 2007, her grandmother died, and in August 2007, her mother died. The Defendant testified that, despite these difficulties, she resisted using drugs, something she "never, ever thought" herself able to do. At the time of the sentencing hearing, the Defendant testified she had not used drugs for nineteen months.

During the sentencing hearing, the Defendant apologized to Cannon, the minor victim of one of the Defendant's aggravated robberies:

> I'm really sorry, and to hear her tell it the way she did about the kids and–I understand how she feels. I understand how her parents feel because I am a mother and I would hate that it would happen to my kids, and it makes me sick to think that I was–that I did that, that I made her feel that way, and I'm real sorry.

Also, the Defendant explained her process for dealing with her desire to use drugs:

> I'm in jail so there's only so much I can do, but I pick up the phone. . . . I do have a sponsor. I can call her. I have family members that I call, and I pray a lot just to try to get through it because, I mean, it is depressing in jail, and I–and I was depressed a lot when I was out on the streets, but I made it through . . . . I just know–I know I have to do this one day at a time, but I know that I don't ever want to use drugs again.

She explained she was grateful for having been caught robbing the pharmacies because "it put a stop to it," saying, "I had to have a bottom and that was my bottom, and I think if I hadn't got caught, I'd be dead either from the drugs or somebody would have killed me."

On cross examination, the Defendant explained that her job as a hairstylist was not listed on her presentence report because ten years had passed since she held the job. The Defendant testified she first forged a prescription at Hermitage Eye Care, which led to her identity theft charge. She received pre-trial diversion for the identity theft charge, and the court required her to complete drug treatment. After completing treatment, the Defendant returned to Hermitage Eye Care, where she again forged a prescription and, as a result, was fired. The Defendant elaborated that the period in

which she stole morphine from her grandmother lasted "probably a couple of years" and that, during this time, she planned to quit using morphine when her grandmother moved from the area.

The Defendant reiterated that she used only a pellet gun in each of the armed robberies even though she had access to a handgun in her home. She said she did not know how to shoot a gun, but acknowledged that she took a hunter's safety course with her son when he was very young.

The Defendant said she stopped using drugs when she was arrested in January 2007 because the jail staff told her "[she] didn't need [the drugs]." She said between her January 2007 arrest and her sentencing hearing she was drug-tested only once, when she returned from a two-day furlough from jail. She passed this test.

Tracy Hollingsworth, the Defendant's step-sister, testified she had known the Defendant since their parents married when the Defendant was twenty-one years old. In the twenty years that she had observed the Defendant, Hollingsworth found her to be a "normal, attentive" mother and "non-confrontational, . . . nurturing person." Hollingsworth said that, although she had originally believed the Defendant would use drugs again even after she was arrested for the robberies, the Defendant had surprised her. Also, Hollingsworth believed the changes in the Defendant's behavior would persist: "She just acted different[ly] than she had in the past. She was sorry. She confessed. You know, she held herself responsible for once, you know. It was not the same as it was before."

When defense counsel asked whether incarceration was necessary to protect the public from the Defendant, Hollingsworth replied negatively, and explained that the Defendant was not a "dangerous person." She said, "I am aware of what happened [during the robberies] and I still can't wrap my mind around it . . . I was very intrigued . . . to see what addiction can do to somebody to make them go to such measures, because . . . that's not her. It is not her." On cross examination, Hollingsworth said she was not aware the Defendant had been charged with and had received pre-trial diversion for identity theft in 2000.

Steven Goodall, the Defendant's eighteen-year-old son, testified his mother was his sole care–provider because he did not have a good relationship with his step-father. He said the Defendant made sure he completed his school work and attended school, and that she took him to basketball and baseball practice, attended "every single one" of his games, and helped the teams when parents were needed.

Goodall testified he never saw his mother use drugs, and he learned of her drug use when she first attended drug rehabilitation. Goodall went with his mother to drug treatment both before and after her arrest, and he accompanied her to Narcotics Anonymous meetings. He testified that his mother behaved differently in rehabilitation after her arrest:

> She's more active in the [Narcotics Anonymous] program and she's made new friends in there and she's been involved with it. In the past she would go to the meetings and . . . really didn't associate with people there. Like she would go there and go through the steps and all that, but she wouldn't . . . participate with them. She would go out to eat with them this time and she was always with them. She kept herself busy with them.

Goodall said he "completely believed" the Defendant was going to stay off drugs.

Melanie Rich, a childhood friend of the Defendant, testified she had known the Defendant for twenty-five years. She said that the Defendant had always been a "great mom to her kids" and that the Defendant was generally a very timid, kind person. She said she had never known the Defendant to be mean, and Rich elaborated that it was "inconceivable" to her that the Defendant had robbed the pharmacies. On cross-examination, Rich said she was not aware of the Defendant's identity theft conviction.

Two members of the Defendant's Narcotics Anonymous group testified on her behalf. The first testifying member was a former licensed marriage, family and child therapist with substance abuse training. She said that, having attended Narcotics Anonymous meetings several times a week with the Defendant, she believed the Defendant was on a positive trajectory and would stay sober. She was particularly impressed with the Defendant's acknowledgment of responsibility for her crimes as well as her lack of self-pity. The second testifying member, the Defendant's sponsor in Narcotics Anonymous, recounted that, although several fellow Narcotics Anonymous members had asked her to testify on their behalf, the Defendant was the first member she agreed to recommend. She believed the Defendant would refrain from using drugs because, in her view, the Defendant was committed to never using drugs again. Also, she was impressed with the Defendant's abstinence throughout the time period following her mother's death.

At the conclusion of the Defendant's sentencing hearing, the trial court found that several enhancement factors, which we will discuss in detail in our analysis, applied to the Defendant's various convictions, but it did not find that any mitigating factors applied. The trial court then sentenced the Defendant to five years for her robbery conviction, eleven years each for three of her aggravated robbery convictions, and twelve years for her fourth aggravated robbery conviction. The court ordered the Defendant's twelve year sentence for the fourth aggravated robbery to be served consecutively to the rest of her sentences, for a total effective sentence of twenty-three years in the Tennessee Department of Correction. It is from these judgments that the Defendant now appeals.

II. Analysis

The Defendant makes numerous objections to both the length and alignment of her sentences. Below we address each of her objections and our corresponding conclusions.

1. Length of Sentence

The Defendant contends that the trial court erred in setting the length of her sentences. Specifically, the Defendant argues the trial court: (1) improperly applied several enhancement factors to her convictions; and (2) failed to recognize several mitigating factors.

When a defendant challenges the length, range, or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court properly sentenced the defendant. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. If the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

As we will explain in detail below, we conclude that the trial court wrongly applied one enhancement factor and did not consider mitigating factors. As such, we review the Defendant's sentence de novo with no presumption of correctness. *See Ashby*, 823 S.W.2d at 169.

a. Enhancement Factors

The Defendant contends that the trial court improperly applied enhancement factors (1), (3), (4), (6), and (10) to her convictions. As such, the Defendant continues, the trial court failed to follow appropriate sentencing procedures, and this Court, therefore, cannot presume her sentences are correct. She argues this Court should reduce her sentences to the statutory minimum after a de novo review. The State responds that the trial court properly applied each enhancement factor, properly declined to apply several mitigating factors, and considered the principles of sentencing in setting

the Defendant's sentence.

The Criminal Sentencing Act of 1989 and its amendments describe the process for determining the appropriate length of a defendant's sentence. Under the Act, a trial court may impose a sentence within the applicable range as long as the imposed sentence is consistent with the Act's purposes and principles. T.C.A. § 40-35-210(c)(2) and (d) (2006); *see State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). The Tennessee Code allows a sentencing court to consider the following enhancement factors, among others, when determining whether to enhance a defendant's sentence:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
>
> . . .
>
> (3) The offense involved more than one (1) victim;
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> (4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;
>
> . . .
>
> (6) The personal injuries inflicted upon, or the amount of damage sustained by or taken from, the victim was particularly great;
>
> . . .
>
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high . . . .

T.C.A. § 40-35-114(1), (3), (4), (6), and (10) (2006). If an enhancement is not already an essential element of the offense and is appropriate for the offense, then a court may consider the enhancement factor in its length of sentence determination. T.C.A. § 40-35-114 (2006). In order to ensure "fair and consistent sentencing," the trial court must "place on the record" what, if any, enhancement and mitigating factors it considered as well as its "reasons for the sentence." T.C.A. § 40-35-210(e). Before the 2005 amendments to the Sentencing Act, both the State and a defendant could appeal the manner in which a trial court weighed enhancement and mitigating factors it found to apply to the defendant. T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendments deleted as grounds for appeal, however, a claim that the trial court did not properly weigh the enhancement and mitigating factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 8, 9. In summary, although this Court cannot review a trial court's weighing of enhancement factors, we can review the trial court's application of those enhancement factors. T.C.A. § 40-35-401(d) (2006); *Carter*, 254 S.W.3d at 343.

The Defendant is a Range I offender, and aggravated robbery is a Class B felony. T.C.A. § 39-13-402(b) (2003). Therefore, the appropriate range for each of the Defendant's aggravated

robberies is eight to twelve years. T.C.A. § 40-35-112(a)(2) (2003). At the conclusion of the Defendant's sentencing hearing, the trial court applied three enhancement factors to three of the Defendant's four aggravated robbery convictions: enhancement factor (1), that the Defendant had a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; enhancement factor (3), that the offense involved more than one victim; and enhancement factor (10), that the Defendant had no hesitation about committing a crime when the risk to human life was high. *See* T.C.A. § 40-35-114(1), (3), and (10). The trial court gave the Defendant enhanced sentences of eleven years for the three aggravated robbery convictions.

To the Defendant's fourth aggravated robbery conviction, which involved the minor victim, the trial court applied four enhancement factors: enhancement factors (1), (3), and (10), and also enhancement factor (4), that a victim of the offense was particularly vulnerable because of age. *See* T.C.A. § 30-45-114(1), (3), (4), and (10). The trial court enhanced the Defendant's sentence to twelve years for this fourth aggravated robbery conviction.

The Defendant's remaining conviction, robbery, is a Class C felony. T.C.A. § 39-13-401(b) (2003). Therefore, the appropriate range for the Defendant's robbery conviction is three to six years. T.C.A. § 40-35-112(a)(3). The trial court applied enhancement factors (1) and (10) to the Defendant's robbery conviction. The trial court enhanced the Defendant's sentence to five years for the robbery conviction.

The Defendant disputes the trial court's application of each of the enhancement factors the trial court applied, so we address the applicability of each factor below. Because our review of the record does not reveal that the trial court, as the Defendant claims, applied enhancement factor (6) to enhance any of the Defendant's convictions, we will not address factor (6)'s applicability.

i. Enhancement Factor (1): the Defendant's Criminal History

The Defendant first challenges the trial court's application of enhancement factor (1), that the Defendant had a history of criminal conduct, to each of her convictions. *See* T.C.A. 40-35-114(1). She concedes that she has a history of criminal conduct but contends her criminal record does not justify the trial court's enhancement of her sentences. As we have discussed, however, this Court may not properly consider an objection to the weight given any enhancement factor; rather, we may only address whether the enhancement factor was properly applied. *See* T.C.A. § 40-35-401(d)(2). The record shows that the State adequately established the Defendant had previously been convicted of identity theft and had forged a prescription for pain medication. Therefore, the trial court properly applied this enhancement factor and we refrain from addressing the weight the trial court afforded this factor. The Defendant is not entitled to relief on this issue.

ii. Enhancement Factor (3): Multiple Victims

Next, the Defendant challenges the trial court's application of enhancement factor (3), that the Defendant's offense involved more than one victim, to each of her aggravated robbery convictions, again conceding that the factor applies but arguing the trial court gave the factor too much weight in sentencing. *See* T.C.A. § 40-35-114(3). The record shows that each aggravated robbery involved more than one victim. As such, the trial court properly applied enhancement factor (3) to each of the Defendant's convictions for aggravated robbery. Furthermore, as discussed above, this Court is unable to review the trial court's weighing of enhancement factors. *See* T.C.A. § 40-35-401(d)(2). Therefore, the trial court did not err when it applied enhancement factor (3) to the Defendant's aggravated robbery convictions. The Defendant is not entitled to relief on this issue.

iii. Enhancement Factor (10): No Hesitation Where Risk to Human Life is High

The Defendant challenges the trial court's application of factor (10), that the Defendant had no hesitation about committing a crime when the risk to human life was high. She argues first that the risk created to her own life by her crime does not support application of factor (10). Second, she argues that the proof introduced at her sentencing hearing does not support the trial court's finding, necessary for factor (10)'s application, that the Defendant's robberies created a risk to the lives of individuals other the victim. Finally, she contends factor (10) does not apply because the risk she created to human life is inherent in the offense of aggravated robbery. The State responds that the trial court specifically found that the robberies risked the lives of individuals within the store as well as the Defendant's own life.

Enhancement factor (10) applies where the defendant "had no hesitation about committing a crime when the risk to human life was high." T.C.A. § 40-35-114(10). In general, factor (10) applies only where the facts that establish that the defendant created a high risk to human life also demonstrate a greater culpability than that incident to the offense underlying the enhancement. *State v. Jones*, 883 S.W.2d 597, 601 (Tenn. 1994). As a result, where a high risk to human life is inherent in the underlying conviction, enhancement factor (10) applies only if the defendant disregarded a high risk to the life of a person other than the victim. *State v. Zonge*, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997). Aggravated robbery is a crime that inherently includes a high risk to human life. *State v. Katia Lenee Harris*, No. M2006-02611-CCA-R3-CD, 2007 WL 4125460, *5 (Tenn. Crim. App., at Nashville, Nov. 16, 2007), *no Tenn. R. App. P. 11 application filed*. Therefore, in order to properly use this factor to enhance a sentence for aggravated robbery, the defendant must have put individuals in addition to the victims at risk. *Id.*; *Zonge*, 973 S.W.2d at 259.

The trial court made the following comments regarding the applicability of enhancement factor (10):

> I do find that she had no hesitation about committing a crime when risk to human life was high. When you walk into a drugstore and you have a gun, the risk to human life is high. You could say, well, it's a BB gun, it's just conceptual, nothing really happened, but the fact of the matter is, when people go in with guns, they risk not only the lives of the people in there, but their own, and I think that's applicable in this case.

The trial court, therefore, based its application of factor (10) on the risk created not only to the patrons of each pharmacy during the robberies but also to the Defendant herself. On review, we conclude the trial court erroneously based in part its application of factor (10) to the risk the Defendant created to her own life. The trial court properly based its application of factor (10), however, to the risk created to the lives of other store customers.

The risk the robberies posed to the life of the Defendant herself cannot serve as a basis for factor (10)'s application. As the Defendant cogently points out, to apply factor (10) based on the risk created to the Defendant's life would necessitate the factor's application in every scenario where a defendant wields a gun. Because risk to the Defendant's life does not demonstrate a greater culpability than that incident to the Defendant's aggravated robberies, it cannot serve as basis for application of factor (10). *See Jones*, 883 S.W.2d at 601.

The risk created to the people present in the stores during the robberies of each pharmacy does, however, support application of factor (10). The Defendant acknowledged in her testimony that customers were near the pharmacy when she initially approached the pharmacy, although she testified she waited for them to walk away before she demanded drugs. Had the Defendant robbed a person, home, or small business, this high likelihood of bystanders would not be present. The risk to the customers and employees of each convenience store demonstrates a culpability greater than that incident to the Defendant's armed robberies. As such, the trial court properly applied factor (10) to enhance the Defendant's sentences. She is not entitled to relief on this issue.

iv. Enhancement Factor (4): Particularly Vulnerable Victim

The Defendant challenges the trial court's application of enhancement factor (4), that her crime involved an especially vulnerable victim due to the victim's age, to the Defendant's fourth aggravated robbery conviction. *See* T.C.A. 40-35-114(4). She contends that enhancement factor (4) does not apply to her crime because the proof showed neither that the victim was especially vulnerable nor that the Defendant actually took advantage of any vulnerability in the victim. The State responds that the trial court properly applied factor (4) because the record showed the minor victim suffered ongoing psychological injury as a result of the aggravated robbery.

The text of enhancement factor (4) provides that factor (4) applies where "a victim of the offense was particularly vulnerable because of age or mental disability." T.C.A. § 40-35-114(4). Whether a victim is "particularly vulnerable" for purposes of factor (4) is "a factual issue to be resolved by the trier of fact on a case by case basis." *State v. Lewis*, 44 S.W.3d 501, 505 (Tenn. 2001); *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). Application of factor (4) requires that the victim's vulnerability be "relevant" to the crime in that it influences the victim's ability to resist the offense in the manner in which the offense was committed. *Lewis*, 44 S.W.3d at 504 (citing *Poole*, 945 S.W.2d at 97). Therefore, although a victim's age may make him or her vulnerable in a general sense, the proof must show that the victim's age was a "factor" in the crime in that it "play[ed] a part in the crime." *Id*. at 504-505. Although extensive proof is unnecessary, the State must proffer some evidence in addition to the victim's age to establish the victim's "particular vulnerability." *Poole*, 945 S.W.2d at 97. This evidence must show that the victim's vulnerability "had some bearing on, or some logical connection to, 'an inability to resist the crime, summon help, or testify at a later date.'" *Lewis*, 44 S.W.3d at 505 (citing *Poole*, 945 S.W.2d at 96).

In *Lewis*, our Supreme Court affirmed factor (4)'s application to the commission of arson upon a building that contained seven young children. 44 S.W.3d at 505. The Court explained that, because the proof showed that some of the children had to be physically removed from the building by their parents, the record contained sufficient evidence in addition to the victims' ages to show that the victims were particularly vulnerable to an act of arson upon their dwelling. *Id*. Similarly, in *State v. Anthony Murff*, this Court affirmed the trial court's application of factor (4) where the proof showed that the elderly victim remained conscious after the defendant struck him in the back of the head with a hammer. 2002 WL 1284296, *13 (Tenn. Crim. App., at Jackson, June 11, 2002), *no Tenn. R. App. P. 11 application filed*. This Court explained that, because a "young and able-bodied man" would better have been able to defend himself after being struck, the proof demonstrated that the victim's age made him especially vulnerable to the defendant's attack. *Id*.

Where a victim's age or physical weakness is not a "factor" in the defendant's crime against the victim, courts have sometimes reversed the application of factor (4). For example, in *State v. Butler*, this Court reversed the trial court's application of factor (4) where the victim was shot from a distance. 900 S.W.2d 305, 313 (Tenn. Crim. App. 1994). This Court explained that anyone, regardless of age or strength, would have been killed by the gunshot. *Id*. Similarly, in *State v. Seals*, this Court reversed factor (4)'s application because the advanced age of the victims, who never came into contact with the defendant, did not facilitate the defendant's theft from the victims' mailboxes. 735 S.W.2d 849, 853-54 (Tenn. Crim. App. 1987).

The Defendant asserts that *State v. Poole* further requires that, in order to apply factor (4), a trial court must find the defendant actually took advantage of the victim's vulnerability during his crime. *See Poole*, 945 S.W.2d at 96. Contrary to the Defendant's assertion, application of factor (4) requires no such finding. As our Supreme Court explained in *State v. Lewis*, "Nothing in *Poole* should be read to place an additional burden on the State to prove that a defendant actually evaluated

the vulnerabilities of his victims and then acted to capitalize on those perceived vulnerabilities." *Lewis*, 44 S.W.3d at 505. The Court then noted that proof that a defendant actually evaluated and capitalized on a victim's vulnerabilities, although unnecessary, would also satisfy factor (4). *Id*. Therefore, use of the "particularly vulnerable" enhancement factor is appropriate in this case if the facts show that the victim's vulnerability to the Defendant's aggravated robbery made the victim less likely to resist the robbery, summon help, or testify at a later date. *See id*.; *Poole*, 945 S.W.2d at 97.

In the case under submission, the victim, Cannon, was seventeen years old when the Defendant robbed the pharmacy where she worked as a pharmacy technician. The Defendant approached her at her station at the Eckerd pharmacy, produced a note demanding drugs, and brandished the handle of a weapon. After Cannon summoned the pharmacist, the pharmacist gave the Defendant drugs, and the robbery ended without a physical altercation. This case is different from the cases involving a physical attack upon a victim; therefore, Cannon's age as it relates to her ability to deflect a physical threat is not relevant. Cannon's age is relevant, if at all, only insofar as it indicates her emotional capacity to resist the robbery, summon help, and testify against the Defendant.

After reviewing the record, we conclude that Cannnon's age and corresponding emotional capacity did not, in fact, affect her ability to resist the robbery, summon help, or testify against the Defendant. *See Lewis*, 44 S.W.3d at 505. The record shows that, during the robbery, Cannon became afraid and cried when the Defendant showed her the gun but that she quickly summoned the pharmacist, who promptly complied with the Defendant's demands. After the robbery, Cannon feared returning to work. Also, Cannon testified against the Defendant at her sentencing hearing. In our view, neither Cannon's conduct during the robbery nor her fear after the robbery demonstrate that her age "had some bearing on, or some logical connection to, 'an inability to resist the crime, summon help, or testify at a later date.'" *See Id*. at 505. We conclude that the record preponderates against the trial court's finding that the victim was particularly vulnerable because of her age, and, therefore, that the trial court erred when it applied enhancement factor (4) to enhance the Defendant's aggravated robbery sentence.

The trial court, therefore, appropriately applied enhancement factors (1), (3), and (10) to the Defendant's convictions but erred when it applied enhancement factor (4) to the Defendant's aggravated robbery conviction. Because of this error, we will review the Defendant's sentences de novo, with no presumption of correctness, and re-sentence the Defendant appropriately. *See Ashby*, 823 S.W.2d at 169. The erroneous application of one or more enhancement factors by the trial court does not, however, necessarily lead to a reduction in the length of the sentence. *State v. Winfield*, 23 S.W. 3d 279, 284 (Tenn. 2000).

In conducting our de novo review of a sentence, we consider the same factors that the Tennessee Code instructs a trial court to consider during sentencing: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and

arguments as to sentencing alternatives, (4) the nature and characteristics of the offense, (5) any mitigating or enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses; and (7) any statements made by the defendant on his or her own behalf. *See* T.C.A. § 40-35-210 (2006); *State v. Foster*, No. W2007–02636-CCA-R3-CD, 2009 WL 275790, *4 (Tenn. Crim. App., at Jackson, Feb. 3, 2009), *no Tenn. R. App. P. 11 application filed*.

b. Mitigating factors

The Defendant contends that the trial court's refusal to apply any mitigating factors, including factors (1), (8), and (13), to her sentence was in error. The Defendant argues that her addiction, her recovery from addiction, her remorse, her cooperation with investigating authorities and subsequent guilty plea, and the absence of serious bodily injury to her victims mitigate her culpability.

As outlined above, the Sentencing Act requires this Court, in conducting its de novo review, to consider all mitigating factors applicable to the Defendant. *See* T.C.A. § 40-35-210; *Foster*, 2009 WL 275790, *4. Section 40-35-113 contains a non-exclusive list of mitigating factors that a trial court may apply to a defendant's sentence "if appropriate for the offense." T.C.A. § 40-35-113(2006). The list contains the following three mitigating factors that the Defendant argues apply to her sentence:

> (1) The defendant's criminal conduct neither caused nor threatened serious bodily injury;
>
> . . . .
>
> (8) The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor;
>
> . . . .
>
> (13) Any other factor consistent with the purposes of this chapter.

T.C.A. § 40-35-113(1), (8), and (10). The burden of proving applicable mitigating factors rests upon the defendant. *State v. Moore*, No. 03C01-9403-CR-00098 (Tenn. Crim. App., at Knoxville, Sept. 18, 1995), *perm. app. denied* (Tenn. 1996).

At the conclusion of the sentencing hearing, the trial court specifically rejected application of mitigating factors (1) and (8) and declined to apply any other mitigating factor.

i. Mitigating Factor (1): Absence of Actual or Threatened Serious Bodily Injury

The Defendant contends mitigating factor (1) applies to her sentence because her crimes neither caused nor threatened serious bodily injury. She argues that the potential harm to store employees created by her robbery is "more conceptual than real" and, therefore, does not interfere with factor (1)'s applicability. Factor (1) applies where "the defendant's criminal conduct neither caused nor threatened serious bodily injury." T.C.A. § 40-35-113(1). Our Supreme Court has emphasized factor (1)'s application "focuses not on the circumstances of the crime committed by a defendant as do many of the other mitigating and enhanc[ement] factors. Rather, this factor focuses upon the defendant's conduct in committing the crime." *See State v. Ross*, 49 S.W.3d 833 (Tenn. 2001). For example, the defendant in *Ross* was convicted of possessing cocaine, and the trial court refused to apply mitigating factor (1), reasoning that cocaine, an inherently dangerous substance, necessarily threatened serious bodily harm. *Id*. at 848. Our Supreme Court, however, held that factor (1) did apply because the defendant did nothing with the cocaine to threaten serious bodily injury, such as attempt to sell the cocaine. *Id*. The Supreme Court emphasized in *Ross* that mitigating factor (1) applies where the threat, if any, of serious bodily injury is "more conceptual than real." *Id*.

At the conclusion of the Defendant's sentencing hearing, the trial court refused to apply mitigating factor (1), explaining that, in its view, the Defendant threatened serious bodily harm by robbing an "establishment" with a gun:

> I looked seriously at these mitigating factors, and . . . the defendant's criminal conduct neither caused nor threatened serious bodily injury is [a mitigating factor] that the defense wants me to consider. I do not think that's applicable. As I said earlier, when you walk into an establishment with a gun, I just don't think that you can say that you're not threatening serious bodily injury. You don't know how anybody in there is going to react to the presence of that weapon, real or not.

After a review of the record, we conclude that the trial court properly declined to apply mitigating factor (1) to the Defendant's convictions. In analyzing whether the Defendant's conduct "threatened serious bodily injury," we transfer our focus, as *Ross* requires, from the circumstances surrounding the Defendant's offense to the Defendant's actions themselves. *See Ross*, 48 S.W.3d at 848. Even doing so, we do not perceive the threat of bodily injury to have been "more conceptual than real." *See id*. The act of carrying even a pellet or "bb" gun into any business, where employees and customers are present, creates the possibility that the gun will discharge and strike an employee or customer. Further, if an armed security guard or customer were present in the store and responded to the Defendant's threats by opening fire on the Defendant, the risk of serious bodily injury to customers and employees would escalate. These risks are not merely conceptual because they do not depend on an attenuated link between the crime of armed robbery and a general community ill, as did the risks created by the *Ross* defendant. *See id*. Instead, the risks depend on the immediate

potential effects of robbing a store, rather than a home or individual, where the possibility of security response and bystander injury are diminished. Accordingly, we conclude that the Defendant created a serious risk of serious bodily injury that was not "more conceptual than real" and that, therefore, the trial court did not err when it refused to apply mitigating factor (1) to her sentences. She is not entitled to relief on this issue.

ii. Mitigating Factor (8): A Defendant's Mental or Physical Condition

The Defendant contends the trial court erred when it refused to apply mitigating factor (8) because she suffered from depression and was addicted to morphine when she robbed the pharmacies. Mitigating factor (8) applies where the defendant was suffering from a mental or physical condition, other than "the voluntary use of intoxicants," that significantly reduced the defendant's culpability for the offense. T.C.A. § 40-35-113(8). Courts have faithfully applied the factor's exclusion of mental or physical conditions resulting from the voluntary use of intoxicants. *See* T.C.A. § 40-35-113(8) ("the voluntary use of intoxicants does not fall within the purview of this factor"); *State v. Raines*, 882 S.W.2d 376, 385-86 (Tenn. Crim. App. 1994). In *Raines*, the defendant argued his drunkenness caused him to kill his victim, but this Court explained factor (8) did not apply to the defendant because his intoxication was voluntary. *Id*. Also, a defendant's addiction to drugs does not reduce his or her culpability within the meaning of mitigating factor (8), because this Court has consistently concluded that factor (8) excludes drug addiction as a "voluntary use of intoxicants." *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995); *State v. James Bradley Warner*, No. M2001-01371-CCA-R3-CD, 2002 WL 464834, *6 (Tenn. Crim. App., Mar. 26, 2002), *perm. app. denied* (Tenn. Sept. 16, 2002).

Depression is a mental or physical condition that may diminish culpability under mitigating factor (8). *See State v. Johnell Hoskins*, No. 01C01-9805-CC-00233, 1999 WL 270351, *2 (Tenn. Crim. App., at Nashville, Apr. 29, 1999), *no Tenn. R. App. P. 11 application filed*. Just as any other condition, however, a "causal link" must exist between the defendant's depression and his or her offense in order for factor (8) to apply. *Id*. (citing *State v. Mark W. Rawlings*, No. 02C01-9612-CR-00475, *5 (Tenn. Crim. App., at Jackson, Feb. 10, 1998), *no Tenn. R. App. P. 11 application filed*).

In the case under submission, trial court explained that it would not apply mitigating factor (8) to the Defendant's sentence because her ailment, drug addiction, is voluntary:

> Also, the defense has asked me . . . to mitigate the sentence by Number 8, the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability. However, [factor (8)] goes on to say, voluntary use of intoxicants does not fall within the purview of this factor.
>
> She was on drugs. There's no question about that, and I just don't feel that she was

> impaired to the point where it was a mitigating factor. I mean, she talked about how she felt and she was trying not to have to go off the Morphine and that . . . was why she did it, but I don't think that Number 8 is a mitigating factor . . . .

The Defendant suffered from a long history of involvement with and abuse of prescription painkillers. Although her addiction to painkillers precipitated her decision to rob the Wilson County pharmacies, her addiction was the result of the voluntary use of intoxicants. *See Black*, 924 S.W.2d at 917. Because the Defendant's affliction, drug addiction, falls within a category of disorders specifically excluded from factor (10), the trial court properly declined to apply factor (10) to the Defendant's sentences. *See* T.C.A. § 40-35-113(8); *Black*, 924 S.W.2d at 917; *Raines*, 882 S.W.2d at 385-86. Further, the record does not show a "causal link" between the Defendant's depression and the robberies. *See Hoskins*, 1999 WL 270351, *2. Rather, the Defendant's addiction to prescription painkillers prompted her to rob the pharmacies. As such, the Defendant is not entitled to relief on this issue.

iii. Mitigating Factor (13): The Defendant's Rehabilitation, Genuine Remorse & Cooperation

The Defendant contends that her genuine remorse, her cooperation with police, her rehabilitation, and her guilty plea all fall under mitigating factor (13), codified at Tennessee Code Annotated section 40-35-113(13). Factor (13) is the "catch-all" of the statute, and it provides that a trial court may apply as a mitigating factor "any other factor consistent with the purposes of this chapter." "[M]itigating factor (13) is usually applied where the trial court found some condition of the defendant or some action or inaction by the defendant apart from the trial proceedings that necessitated leniency, but was not covered by the statute explicitly." *State v. Bobby Northcutt*, No. M2003-02805-CCA-R3-CD, 2004 WL 2266798, *5-6 (Tenn. Crim. App., at Nashville, Oct. 7, 2004), *no Tenn. R. Crim. P. 11 application filed*.

Each factor that the Defendant argues mitigates against her culpability has indeed been recognized as a subsection (13) consideration. First, a defendant's genuine, sincere remorse is a valid factor (13) consideration. *See State v. Williamson*, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995). Similarly, a defendant's rehabilitation is a valid basis upon which to base factor (13). *See State v. James Dale Walker*, No. E2003-01372-CCA-R3-CD, 2004 WL 587638, *3 (Tenn. Crim. App., at Knoxville, Mar. 25, 2004), *no Tenn. R. App. P. 11 application filed*. Finally, a defendant's cooperation with police and guilty plea are proper bases for application of factor (13). *See State v. Jeffrey Brian Parks*, No. M2003-02002-CCA-R3-CD, 2004 WL 1936404, *5 (Tenn. Crim. App., at Nashville, Aug. 30, 2004), *no Tenn. R. App. P. 11 application filed*.

In the case at hand, the record shows the Defendant, during her sentencing hearing, apologized to Cannon, the minor victim of one of aggravated robberies. Also, according to various

witnesses who testified on the Defendant's behalf, the Defendant accepted responsibility for the aggravated robberies. Thus, in our view, the record establishes the Defendant's remorse, and the trial court erred when it failed to recognize the Defendant's remorse as a mitigating factor under subsection (13). *See* T.C.A. § 40-35-113(13); *Williamson*, 919 S.W.2d at 83.

Also, the record establishes that the Defendant at the time of the sentencing hearing had rehabilitated herself from her drug addictions. First, the record shows that the Defendant attended an outpatient treatment program for her drug addiction after she was released from jail after her January 2007 arrest. The Defendant testified that she has not used drugs since her January 2007 arrest, which amounted to an eighteen-month period of sobriety before her sentencing hearing. Also, various witnesses testified that the Defendant had not, to their knowledge, used drugs since her arrest. These witnesses also observed changes in the Defendant's behavior that indicated a heightened seriousness and dedication to remaining sober. The State introduced no proof in contradiction to the Defendant's proof of her sobriety. We find nothing in the record indicating the trial court found this evidence to be less than credible. Thus, the Defendant showed that she successfully rehabilitated herself from her drug addictions, and the trial court erred when it failed to recognize this factor under subsection (13). *See* T.C.A. § 40-35-113(13); *Walker*, 2004 WL 587638 at *3.

Finally, the Defendant, although initially evasive, promptly confessed to having robbed the pharmacies, and she subsequently entered a guilty plea, saving the time and expense of trial. Thus, the record establishes the Defendant cooperated with police. *See* T.C.A. § 40-35-113(13); *Parks*, 2004 WL 1936404 at *5. As such, the trial court erred when it failed to recognize the Defendant's cooperation as a mitigation of her culpability.

In conducting our de novo review of the Defendant's sentence, we will consider only her remorse, rehabilitation, and cooperation as mitigating circumstances. *See* T.C.A. § 40-35-113(13) Her actions, however, created a risk of serious bodily injury, and her addiction to painkillers was not a physical condition that reduced her culpability within the meaning of subsection 113(8). *See* T.C.A. § 40-35-113(1), (8). As such, mitigating factors (1) and (8) do not mitigate against the Defendant's punishment, and we will not consider them in our de novo review of her sentence.

2. De Novo Review of Sentences

In conducting our de novo review of the Defendant's sentences, we consider the Defendant's presentence report, the victim impact letters and statements introduced during her sentencing hearing, the Defendant's prior conviction, the nature and circumstances of her crimes, and the applicable enhancement and mitigating enhancement factors. *See* T.C.A. § 40-35-210.

Notwithstanding the trial court's misapplication of enhancement factor (4) to one of the Defendant's aggravated robbery convictions, the trial court properly applied enhancement factors (1), (3), and (10) to each of her convictions for aggravated robbery and robbery. As we have explained, however, the record shows that the Defendant's remorse, rehabilitation, and cooperation are applicable mitigating factors. In light of the applicable enhancement and mitigating factors and the nature and circumstances of the Defendant's crimes, we conclude that adjustment of each of the Defendant's sentences is necessary. *See* T.C.A. § 40-35-210.

The trial court sentenced the Defendant to five years, one year less than the maximum sentence, for her commission of robbery. *See* T.C.A. § 40-35-112(a)(3). The trial court sentenced the Defendant to twelve years, the maximum of the appropriate sentencing range, for one of her aggravated robberies. *See* T.C.A. § 40-35-112(a)(2). For each of her three remaining aggravated robbery convictions, the trial court sentenced the Defendant to eleven years.

On the robbery conviction, because the trial court failed to apply several enhancement factors, we resentence the Defendant to four years. Similarly, because the trial court failed to apply mitigating factors to each of the Defendant's aggravated robbery convictions that did not involve the minor victim, we resentence the Defendant to ten years on each. Finally, on the fourth aggravated robbery conviction, because the trial court both improperly applied an enhancement factor and failed to apply several mitigating factors, we resentence the Defendant to ten years.

4. Alignment of Sentences

The Defendant argues the trial court erred when it imposed consecutive sentencing based on a finding that the Defendant was a "dangerous offender." *See* T.C.A. § 40-35-115(4) (2006). Contending the "dangerous offender" category only applies to armed robbery convictions where additional aggravating circumstances exist, the Defendant argues her armed robbery commissions were "run of the mill," unaccompanied by aggravating circumstances. The State responds that the public venue in which the Defendant committed her aggravated robberies, her past failures to rehabilitate herself, and her "extensive record of admitted criminal activity" justify the consecutive sentences she received.

It is within the sound discretion of the trial court whether or not an offender should be sentenced consecutively or concurrently. *State v. James*, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). A court may order multiple sentences to run consecutively if it finds, by a preponderance of the evidence, that at least one of the following seven factors exists:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b)(1)-(7). In addition to these criteria, consecutive sentencing is subject to the general sentencing principle that the length of a sentence should be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." T.C.A. § 40-35-102(1), 103(2); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). Rule 32(c) of the Tennessee Rules of Criminal Procedure instructs a trial court to explicitly recite on the judgment its reasons for imposing a consecutive sentence.

At the conclusion of the sentencing hearing, the trial court explained that several aspects of the Defendant's case indicated that consecutive sentencing was appropriate. First, the trial court noted that the Defendant committed a "dangerous offense" where the "risk to human life [was] high":

Now, on the issue of concurrent versus consecutive, that was a difficult one for the Court, and it's difficult for many reasons. The main one is that I, after hearing all the testimony today, can accept the fact that this woman hasn't led a life of crime. She is an addict. There's no question about it, but as a result of that addiction, she committed some serious crimes which are aggravated robbery, and, you know, the

> code finds that a violent offense. The legislature certainly takes it seriously.
>
> Aside from murder and some of the sex offenses, it's probably the most serious offense, and I think it's necessary to deter that kind of behavior in a community. So, having said that, because I do find that committing an armed robbery is dangerous, and I'm not going to get into conceptual versus reality. The fact of the matter is, when you go in with a gun you are committing a dangerous offense. The risk to human life is high. Even the defendant's own life.
>
> So I am going to run all of these concurrent with the exception of [Count] 2-14 which will be consecutive to the others, and that will be the judgment of the Court.

Also, at the State's prompting at the conclusion of the hearing, the trial court made the following finding:

> I do find that the length of this is reasonably related to the seriousness of the crimes and that society does need protection from this type of behavior, and all things considered, I think that this is–given her background, given the circumstances of the cases, that this is the best sentence the Court can impose at this point.

The trial court, therefore, appears to have based its order of consecutive sentencing, at least in part, on factor (4), that the Defendant was a "dangerous offender" within the meaning of factor (4). *See* T.C.A. § 40-35-115(4). The trial court also cited the Defendant's failed attempts at rehabilitation and the minor victim's ongoing psychological trauma as support for its order of consecutive sentencing:

> Now, [another thing] that ha[s] influenced me was the fact that her behavior does go back a long way. She had multiple opportunities to clean up and did not.
>
> The fact that the victims–I have read all those victim impact statements and they did have some pretty serious ongoing psychological problems, and for those reasons, I think that the sentences, that the 2-14 should be consecutive to the others and that they should be consecutive to Sumner County, and that will be the judgment of the Court.

The trial court then sentenced the Defendant to eleven years for three of her aggravated robbery convictions, twelve years for her fourth aggravated robbery conviction, and five years for her robbery conviction. The trial court ordered the twelve-year sentence to be served consecutively to the

remaining sentences, which were to be served concurrently. Therefore, the Defendant's total effective sentence was twenty-three years.

Neither the Defendant's failed efforts at rehabilitation nor a victim's injury are valid bases upon which to impose consecutive sentencing. *See* T.C.A. § 40-35-115(b)(1)-(7). Accordingly, these two factors do not support the trial court's imposition of consecutive sentencing. The State argues, however, that adequate support remains for consecutive sentencing due to the Defendant's status as a "dangerous offender" and that, therefore, the record supports consecutive sentencing under subsection 115(b)(4). Our Supreme Court has noted that this "dangerous offender" category is the hardest and most subjective to apply. *State v. Lane*, 3 S.W.3d 456, 460 (Tenn. 1999). Consequently, our Supreme Court in *State v. Wilkerson* described what "particular facts" must show in order to base consecutive sentencing on subsection 115(b)(4): (1) "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant"; and (2) that the consecutive sentences reasonably relate to the severity of the offenses committed. *Id*.; *State v. Wilkerson*, 905 S.W.2d 933, 938-39 (Tenn. 1995); *State v. Robinson*, 146 S.W.3d 469, 524 (Tenn. 2004).

We first note that the trial court appears to have made the *Wilkerson* findings necessary to impose consecutive sentencing under factor (4). *See Wilkerson*, 905 S.W.2d at 938-39. As we explain below, however, the record preponderates against these findings. *See* T.C.A. § 40-35-115(b)(1)-(7)

Our review of case law reveals that defendants found to be "dangerous offenders" under *Wilkerson*'s first prong typically either committed their crime in an extraordinarily wanton or violent manner or, after their crime, acted in a way that suggested they would offend again. For example, in *State v. Shelbourne*, this Court affirmed the application of subsection 115(b)(4) to a defendant who first held two people hostage at gunpoint, shooting one hostage in the head at point-blank range, and who then committed several robberies, shooting two additional people at close range. 2008 WL 4644186, *6. In another case, *State v. Imfeld*, the defendant, intoxicated, struck a vehicle containing a family of five and pled guilty to driving under the influence and five counts of aggravated assault. 70 S.W.3d 698 (Tenn. 2002). Our Supreme Court explained that, because the Defendant did not seek alcohol-abuse treatment after the accident and was alleged to have driven under the influence again after the accident, the trial court properly found him to be a dangerous offender "unable to control his behavior in such a way that he [could] not be safe in the outside community." *Id*. at 709.

Similarly, in evaluating whether consecutive sentencing is reasonably related to the severity of the offense, courts have required an extraordinary circumstance to accompany the effects of the crime upon the victim or victims. For example, in *State v. Robinson*, our Supreme Court affirmed subsection 115(b)(4)'s application where the defendant beat and humiliated the victim before killing him. 146 S.W.3d 469, 524 (Tenn. 2004). In *Imfeld*, our Supreme Court affirmed the trial court's finding that, because the defendant's driving under the influence offense involved the severe injury

of three children, consecutive sentencing was reasonably related to the severity of the offense. *Id*. at 709.

In the case at hand, the record does not support either prong of the "dangerous offender" basis for consecutive sentencing. Again, as previously stated, to find that the defendant is a dangerous offender we must find (1) that an extended sentence is necessary to protect the public from the Defendant's further criminal conduct; and (2) that the consecutive sentences reasonably relate to the severity of the offenses committed. The record fails to demonstrate that the Defendant is a "dangerous offender." 905 S.W.2d at 938-39. The record shows that, after a medical surgery, the Defendant developed an addiction to prescription painkillers, which led to her addiction to morphine. Following several years of addiction, the Defendant lost access to morphine. Having already experienced at least one painful withdrawal from morphine, the Defendant planned to rob several pharmacies by concealing a pellet gun in her purse and demanding painkillers. The Defendant robbed five Wilson County pharmacies in this manner. No proof was offered controverting the Defendant's testimony that, although she had access to her husband's handguns, the gun she carried was a pellet gun. Similarly, the Defendant neither fired nor completely brandished her weapon. Since being arrested for her robberies, the Defendant has by all accounts ceased using drugs. Numerous witnesses testified that the Defendant's rehabilitation is complete and that her resolve to cease using drugs is sincere. Also, she has not been arrested or charged for any offenses since the robberies. These facts show neither that the Defendant committed her crimes in an especially violent or wanton manner nor that she has demonstrated an inability "to control [her] behavior in such a way that [she would] not be safe in the outside community." *See Imfeld*, 70 S.W.3d at 709. Therefore, the record does not establish the first prong of the *Wilkerson* test, that the threat of the Defendant's future criminal conduct necessitates consecutive sentencing. *See Wilkerson*, 905 S.W.2d at 938-39.

Similarly, the record does not support the second prong of the *Wilkerson* test, that consecutive sentencing reasonably relates to the severity of the offenses committed. *Id*. Evidence was presented at the Defendant's sentencing hearing that several of her victims continue to experience psychological trauma from the robberies. Nonetheless, in our view, the evidence presented does not suggest under *Robinson* and *Imfeld* that consecutive sentencing would reasonably relate to the victims' suffering. *See Robinson*, 146 S.W.3d at 524; *Imfeld*, 70 S.W.3d at 709.

Consequently, we conclude the record does not demonstrate that the Defendant is a dangerous offender and, therefore, does not support consecutive sentencing under subsection 115(b)(4). T.C.A. § 40-35-115(b)(4); *Lane*, 3 S.W.3d at 460. As the trial court erred in imposing consecutive sentencing, and our review of the record reveals no alternative basis for consecutive sentencing, we reverse the imposition of consecutive sentencing. Accordingly, we remand with instructions that the Defendant serve her sentences concurrently, for a total effective sentence of ten years.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the trial court erred when it set the length and alignment of the Defendant's sentences. As such, we modify the Defendant's sentence as indicated and remand with instructions that the Defendant serve her sentences concurrently for a total effective sentence of ten years, to be served in the Tennessee Department of Correction.

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ROBERT W. WEDEMEYER, JUDGE